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DEPARTMENT OF TRANSPORTATION
RESEARCH AND SPECIAL PROGRAMS ADMINISTRATION

(Docket No. IRA-43)

CITY OF MARYLAND HEIGHTS (MISSOURI)
APPLICATION FOR INCONSISTENCY RULING

AGENCY: Research and Special Programs Administration, DOT

ACTION: Public Notice and Invitation to Comment

SUMMARY: The City of Maryland Heights, Missouri, has applied for an administrative ruling determining whether its requirement for a \$1,000 bond for each vehicle carrying hazardous and other wastes is inconsistent with the Hazardous Materials Transportation Act (HMTA), and the Hazardous Materials Regulations (HMR) issued thereunder and, therefore, preempted under Section 112(a) of the HMTA.

DATES: Comments received on or before July 29, 1988, and rebuttal comments received on or before September 16, 1988, will be considered before an administrative ruling is issued by the Director of the Office of Hazardous Materials Transportation. Rebuttal comments may discuss only those issues raised by comments received during the initial comment period and may not discuss new issues.

ADDRESSES: The application and any comment received may be reviewed in the Docket's Unit, Research and Special Programs Administration, Room 8426, Nassif Building, 400 7th Street, S.W., Washington, D.C. 20590. Comments and rebuttal comments on the application may be submitted to the Dockets Unit at the above address, and should include the Docket Number, IRA-43. Three copies are requested. A copy of each comment and rebuttal comment must also be sent to Mr. Michael K. Moran, Building Commissioner, City of Maryland Heights, 212 Millwell Drive, Maryland Heights, MO 63043, and that fact certified to at the time comment is submitted to the Dockets Unit. (The following format is suggested: "I hereby certify that copies of this comment have been sent to Mr. Moran at the address specified in the Federal Register.")

FOR FURTHER INFORMATION CONTACT: Edward H. Bonekemper, III, Senior Attorney, Office of the Chief Counsel, Research and Special Programs Administration, 400 7th Street, S.W., Washington, D.C. 20590, telephone 202-366-4362.

SUPPLEMENTARY INFORMATION:

1. Background

The HMTA (49 App. U.S.C. § 1801 et seq.) at Section 112(a) (49 App. U.S.C. § 1811(a)) expressly preempts "any requirement, of a State or political subdivision thereof, which is inconsistent with any requirement" of the HMTA or the HMR issued thereunder.

Procedural regulations implementing Section 112(a) of the HMTA and providing for the issuance of inconsistency rulings are codified at 49 CFR 107.201 through 107.211. An inconsistency ruling is an advisory administrative opinion as to the relationship between a state or political subdivision requirement and a requirement of the HMTA or HMR. Section 107.209(c) sets forth the following factors which are considered in determining whether a state or local requirement is inconsistent:

- (1) whether compliance with both the state or local requirement and the HMTA or HMR is possible (the "dual compliance" test); and
- (2) the extent to which the state or local requirement is an obstacle to the accomplishment and execution of the HMTA and the HMR (the "obstacle" test).

Inconsistency rulings do not address issues of preemption under the Commerce Clause of the Constitution or under statutes other than the HMTA.

In issuing its advisory inconsistency rulings concerning preemption under the HMTA, OHMT is guided by the principles enunciated in Executive Order 12612 entitled "Federalism" (52 Fed. Reg. 41685, Oct. 30, 1987). Section 4(a) of that Executive Order authorizes preemption of state laws only when the statute contains an express preemption provision, there is other firm and palpable evidence of Congressional intent to preempt, or the exercise of state authority directly conflicts with the exercise of Federal authority. The HMTA, of course, contains an express preemption provision, which OHMT has implemented through regulations and interpreted in a long series of inconsistency rulings beginning in 1978.

2. The Application for Inconsistency Ruling

On May 13, 1988, Michael K. Moran, Building Commissioner of the City of Maryland Heights, Missouri, filed an inconsistency ruling application. That application requested a ruling

concerning the consistency with the HMTA of the following prohibition in Section I of the City's Ordinance 88-378:

No person shall haul sewage, sludge, human excrement, special, hazardous or infectious wastes without providing a bond in the amount of One Thousand Dollars (\$1,000) per vehicle for each vehicle, hauling or to haul sewage, sludge, human excrement, special, hazardous or infectious waste.

The City has requested that this section be reviewed for consistency with the insurance and indemnification requirements of the HMTA. OHMT will consider its consistency with all relevant provisions of both the HMTA and the HMR.

On the issue of consistency, the City states:

We believe this bonding requirement is not in conflict with the Hazardous Materials Transportation Act inasmuch as it imposes an additional requirement upon haulers; it does not exempt, or attempt to exempt them from the requirements of the Hazardous Materials Transportation Act.

3. Public Comment

Comments should be restricted to the issue of whether the requirement in Section 1 of Ordinance 88-378 of the City of Maryland Heights, Missouri, for a \$1,000 bond for each vehicle carrying hazardous and other wastes is inconsistent with the HMTA or the HMR. They should specifically address the "dual compliance" and "obstacle" tests described above under "Background."

Among the issues to be addressed are: Is there any conflict with HMTA or HMR requirements? How great a burden or obstacle is the \$1,000 per vehicle bond? Is any such "obstacle" an obstacle to the HMTA or HMR or merely to transportation?

Commenters should note that the 49 CFR § 387.15 insurance requirements for highway transportation of hazardous wastes and other hazardous materials were not issued under the HMTA and thus are irrelevant to this proceeding.

Persons intending to comment on the application should examine the complete application in the RSPA Dockets Branch, including the text of Ordinance 88-378, and the procedures governing the Department's consideration of applications for inconsistency rulings (49 CFR §§ 107.201-107.211).



Alan I. Roberts, Director
Office of Hazardous Materials
Transportation

MAY 31 1988

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